A

BOCCARD OIL & GAS SDN BHD

v.

TNB ENGINEERING AND CONSULTANCY SDN BHD & ANOR

B

FEDERAL COURT, PUTRAJAYA
NIK HASHIM FCJ
AUGUSTINE PAUL FCJ
ABDUL AZIZ MOHAMAD FCJ
C [CIVIL APPEAL NO: 02(f)-1-2008 (W)]
22 JANUARY 2009

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Propriety of questions framed for the purpose of an appeal - Courts of Judicature*
D *Act 1964, s. 96(a)*

This was the appellant's appeal against the decision of the Court of Appeal that stayed the arbitration proceedings brought by the appellant against the respondents under two sub-subcontracts pertaining to a power station project (see *TNB Engineering and Consultancy Sdn Bhd & Anor v. Boccard Oil and Gas Sdn Bhd* [2008] 1 CLJ 452). The Court of Appeal ('CA') was of the considered view that the appellant should be brought in as a party to another action ('the D3 action') commenced by the respondents as sub-
F contractor against TBV Power (Malaysia) Sdn Bhd ('TBV'), the main contractor of the project. The appellant obtained leave to appeal to this court pursuant to s. 96(a) of the Courts of Judicature Act 1964 on the following two questions:

G (1) whether the existence of a valid arbitration clause accepted and agreed to by the appellant and the respondents could be disregarded and/or superseded by a governing law clause; and

(2) whether the CA had the power and jurisdiction to injunct arbitration proceedings between the two parties for the
H purpose of consolidation of the said arbitration with a civil suit involving a third party (not a party to the arbitration proceedings) in the absence of any provisions in the arbitration agreement or the Arbitration Act 1952 to enable such consolidation.

I

Held (dismissing the appeal)
Per Augustine Paul FCJ:

(1) The object of Question (1) was clearly to determine whether cl. 40 (arbitration clause) could be superseded by cl. 41 (law governing the contract) of the sub-subcontracts but the manner in which it was couched did not give such an expression. Firstly, it was anchored on the premise that the arbitration clause was valid and was accepted and agreed to by both the parties. If it was valid, accepted and agreed to as such, the question of it being superseded did not arise as it must prevail. On the contrary the CA did not decide that the arbitration clause was valid. It ruled that it was inconsistent with cl. 41 and was thereby ineffective. That was in direct contrast to the manner in which the question was framed. Secondly, the question sought a resolution of the prevailing effect of a "governing law clause". Such a clause without any qualification was a reference to a clause that dealt exclusively with the applicable law. The CA did not consider such a position. It dealt with cl. 41 which apart from dealing with the applicable law, also dealt with the jurisdiction of the courts to hear and determine all actions and proceedings arising out of the contract between the parties. That did not accord with the manner in which the question was framed which was confined to the prevailing effect of a governing law clause *per se*. Nevertheless, the question was very general in nature. It merely sought a resolution of the prevailing effect of a governing law clause over an arbitration clause. The authorities made it clear that in such cases it was a matter of the construction of the two conflicting provisions based on the language employed in them that determined which one was to prevail. The question posed made no reference to a consideration of that critical issue. Therefore, the question as it stood did not deal with the judgment or order made by the CA and in any event was very general. (para 8)

(2) Question (2) would be justified if the CA had in fact injuncted the arbitration proceedings between the two parties for the purpose of consolidating it with a civil suit. There was nothing in the CA's judgment to suggest that it injuncted the arbitration proceedings for the purpose of consolidating it with the D3 action. It merely stated that the respondents could be justified in resorting to consolidation in aid of their cause.

Further, the CA's order was merely in terms prayed for by the respondents in their action against the appellant. There was nothing to suggest that the arbitration proceedings was injuncted for the purpose of consolidating it with the D3 action. The order was made in the light of the conclusion by the CA that cl. 40 was ineffective. Therefore, the question did not deal with the judgment or order made by the CA. On the contrary, it was confined to a determination of the power of the CA to order consolidation in the circumstances described in the question and was therefore hypothetical. (para 9)

(3) Both questions did not relate to matters decided by the CA. As such, they did not come within the ambit of s. 96(a) of the CJA. It was therefore not necessary to answer them. (para 10)

Per Abdul Aziz Mohamad FCJ:

(1) Since the plaintiffs had rightly conceded with the defendant that cl. 41 did not override cl. 40 of the sub-subcontracts, Question (1) need not be answered. (para 17)

(2) The CA merely placed an injunction on the arbitration proceedings and did not do so for the purpose of consolidation. They did so to enable the disputes to be resolved in the D3 action. The CA did not order how the defendant was to be brought into the D3 action. (para 19)

(3) Question (2) especially in relation to the purpose part should be answered in the negative. The CA did not have the power to injunct the arbitration, not because it was not vested with the power *per se* but because the purpose of the injunction as stated in the question, *ie*, the purpose of consolidation was not capable in law of achievement. The inclusion of the "purpose" part implied a stand that even though the CA had the power to injunct arbitration proceedings, it did not have the power to do so if it was for the purpose of consolidation. Since the CA did not injunct the arbitration proceedings for that purpose, the question as it stood had no factual basis and was hypothetical or conjectural. It could not be answered. It could only be answered if the second part was removed which then should be answered in the affirmative. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Rayuan kerana menggantung prosiding timbangtara yang dibawa perayu terhadap responden-responden di bawah dua sub-subkontrak berkaitan satu projek stesen janakuasa letrik (lihat *TNB Engineering and Consultancy Sdn Bhd & Anor v. Boccard Oil and Gas Sdn Bhd* [2008] 1 CLJ 452). Mahkamah Rayuan ('MR') telah mengambil pendapat bahawa perayu harus dijadikan pihak dalam satu tindakan lain ('tindakan D3') yang dimulakan oleh responden-responden sebagai sub-kontraktor terhadap kontraktor utama projek, TBV Power (Malaysia) Sdn Bhd ('TBV'). Perayu mendapat kebenaran untuk merayu ke mahkamah semasa di bawah s. 96(a) Akta Mahkamah Kehakiman 1964 ('AMK') atas dua persoalan berikut:

(1) Sama ada kewujudan satu peruntukan timbangtara yang sah dan yang diterima dan dipersetujui oleh perayu dan responden-responden boleh diketepikan begitu sahaja dan/atau diatasi oleh satu peruntukan undang-undang mengawalselia; dan

(2) Sama ada MR mempunyai kuasa dan bidangkuasa untuk menginjunksi prosiding timbangtara antara pihak-pihak bagi maksud penyatuan timbangtara tersebut dengan guaman sivil yang menyangkuti pihak ketiga (bukan pihak kepada prosiding timbangtara) dalam ketiadaan mana-mana peruntukan di dalam perjanjian timbangtara atau Akta Timbangtara 1952 yang membolehkan penyatuan sedemikian dibuat.

Diputuskan (menolak rayuan)
Oleh Augustine Paul HMP:

(1) Tujuan Soalan (1) jelasnya adalah untuk menentukan sama ada fasal 40 (fasal timbangtara) boleh diatasi oleh peruntukan (undang-undang mengawalselia kontrak) sub-kontrak-sub-kontrak berkenaan tetapi cara ianya diajukan tidak menggambarkan kehendak ini. Pertama, ia berasas kepada premis bahawa fasal timbangtara adalah sah, diterima dan dipersetujui oleh kedua-dua pihak. Jika ianya sah, diterima dan dipersetujui, persoalan sama ada ia telah diatasi tidak lagi berbangkit kerana ia seharusnya menjadi terpakai. Di sebalik itu, MR tidak memutuskan bahawa fasal timbangtara adalah sah. MR memutuskan bahawa ianya tidak konsisten dengan fasal 41 dan dengan itu tidak berkesan. Keputusan ini amat bertentangan dengan cara soalan dirangka. Kedua, soalan

memohon resolusi mengenai kesan semasa "fasal undang-undang mengawalselia". Fasal sedemikian, tanpa adanya syarat-syarat, adalah rujukan kepada fasal yang secara ekslusif menangani undang-undang terpakai. MR tidak menimbang kedudukan ini. Ia menangani fasal 41 yang selain dari berhubung kait dengan undang-undang terpakai, juga berkait dengan bidangkuasa mahkamah-mahkamah untuk mendengar dan memutuskan semua jenis tindakan dan prosiding yang berbangkit dari kontrak di antara pihak-pihak. Ini tidak selaras dengan cara bagaimana soalan dirangkakan yang mana adalah khusus mengenai kesan semasa fasal undang-undang mengawalselia *per se*. Apapun, soalan adalah berbentuk umum. Ia hanya memohon resolusi mengenai kesan semasa fasal undang-undang mengawalselia terhadap satu fasal timbangtara. Autoriti-autoriti jelas menunjukkan bahawa dalam kes-kes sedemikian ia adalah berkaitan dengan tafsiran dua peruntukan yang saling bertentangan penentuan yang mana satukah yang akan terpakai, akan bergantung kepada perbahasaan yang digunakan di dalamnya. Soalan yang dikemukakan tidak merujuk kepada pertimbangan isu penting ini. Oleh itu, soalan seperti ianya dikemukakan tidak berkaitan dengan penghakiman atau perintah yang dibuat oleh MR dan walau apapun adalah berbentuk umum.

(2) Soalan (2) mempunyai justifikasi jika MR telah sebenarnya menginjunksikan prosiding timbangtara di antara kedua pihak bagi maksud menyatukannya dengan guaman sivil. Tiada apa-apa pun di dalam penghakiman MR yang menunjukkan bahawa ia telah menginjunksi prosiding timbangtara bagi maksud menyatukannya dengan tindakan D3. Ia hanya menyatakan bahawa responden-responden mungkin berjustifikasi dalam membangkitkan soal penyatuan bagi membantu kausa mereka. Selain itu, perintah MR hanya menurut apa yang dipohonkan responden-responden dalam tindakan mereka terhadap perayu. Tiada apa-apa pun yang menunjukkan bahawa prosiding timbangtara telah diinjunksikan bagi maksud penyatuan dengan tindakan D3. Perintah dibuat berdasarkan konklusi MR bahawa fasal 40 adalah tidak berkesan. Oleh itu, soalan tidak menyentuhi penghakiman atau perintah yang dibuat MR. Ia sebaliknya tertumpu kepada rumusan tentang kuasa MR untuk memerintahkan penyatuan dalam halkeadaan yang diserlahkan di dalam soalan dan dengan itu berbentuk hipotesis.

(3) Kedua-dua soalan tidak berkaitan dengan perkara-perkara yang diputuskan oleh MR. Oleh itu mereka tidak terangkum ke dalam ambit s. 96(a) AMK dan dengan itu tidak perlu dijawab.

Oleh Abdul Aziz Mohamad HMP:

(1) Oleh kerana plaintif-plaintif telah dengan betulnya akur kepada defendan bahawa fasal 41 tidak mengatasi fasal 40 dalam kedua-dua sub-subkontrak, maka Soalan (1) tidak perlu dijawab.

(2) MR hanya mengenakan injunksi terhadap prosiding timbangtara dan tidak berbuat demikian bagi maksud penyatuan. Pengenaan injunksi tersebut adalah bagi membolehkan pertikaian diselesaikan di dalam tindakan D3. MR juga tidak memerintahkan tentang cara bagaimana defendan boleh dibawa masuk ke dalam tindakan D3.

(3) Soalan (2) terutama yang menyentuhi bahagian maksudnya harus dijawab secara negatif. MR tidak mempunyai kuasa untuk menginjunksi timbangtara, bukan kerana ia tidak diberi kuasa sebegitu *per se* tetapi kerana tujuan injunksi seperti yang dinyatakan di dalam soalan, iaitu bagi maksud penyatuan, tidak dapat dicapai di sisi undang-undang. Kemasukan bahagian "maksud" ini mengandaikan bahawa walaupun MR mempunyai kuasa untuk menginjunksi prosiding timbangtara, ia tidak berkuasa berbuat demikian jika maksudnya untuk penyatuan. Oleh kerana MR tidak menginjunksi prosiding timbangtara bagi maksud tersebut, soalan sebagaimana yang dirangkakan tidak mempunyai asas fakta dan berbentuk hipotesis dan rambang. Maka ia tidak boleh dijawab. Ia hanya boleh dijawab jika bahagian kedua dikeluarkan di mana, jika itu berlaku, soalan harus dijawab secara afirmatif.

Case(s) referred to:

EJR Lovelock Ltd v. Exportles [1968] 1 Lloyd's Rep 163 ***(refd)***

Joceline Tan Poh Choo & Ors v. V Muthusamy [2009] 1 CLJ 650 FC ***(refd)***

Paul Smith Ltd v. H & S International Holding Inc [1991] 2 Lloyd's Rep 127 ***(refd)***

Shell International Petroleum Co Ltd v. Coral Oil Co Ltd [1999] 1 Lloyd's Rep 72 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 96(a)

Rules of the High Court 1980, O. 4 r. 1(1)

For the appellant - Dato' Bastian Vendargon (James Monteiro & Shirlena Yogeswaran with him); M/s Zaid Ibrahim & Co
For the respondents - GK Ganesan (Nor Sherina Nofal with him); M/s Philip Choong & Co

[Appeal from Court of Appeal, Civil Appeal No: W-02-129-2006]

Reported by Usha Thiagarajah

JUDGMENT

Augustine Paul FCJ:

[1] This is yet another instance which brings into focus the propriety of questions framed for the purpose of an appeal to this court pursuant to s. 96(a) of the Courts of Judicature Act 1964 ("s. 96(a)").

[2] The facts of the case as outlined in the judgment of the Court of Appeal are as follows. TBV Power (Malaysia) Sdn Bhd ("TBV") is a company incorporated in Malaysia and was the contractor for the supply and installation of works for the third phase of Sultan Salehuddin Abdul Aziz Power Station-Phase 3 (Units 5 and 6) located in the vicinity of Kapar for Tenaga Nasional Berhad ("the project") and comprising 2 x 500 MW turbine generator units complete with all auxiliary equipment and materials. In line with the appointment of TBV as the contractor for the project, the plaintiffs and TBV entered into two sub-contracts both dated 20 September 1996 whereby the plaintiffs agreed to design, fabricate and deliver Low Pressure Fabricated Pipe and Low Pressure Pipe Supports for the project in accordance with the conditions and specifications set out in Section IV of the sub-contracts for the sum of RM5,890,855.09 and RM1,458,144.92 respectively, ("the sub-contracts"). Thereafter, the plaintiffs and the defendant entered into two sub-subcontracts on 22 January 1997 and 29 January 1997, whereby the defendant agreed to design, fabricate and deliver Low Pressure Fabricated Pipe and Low Pressure Pipe Supports for the project in accordance with the conditions and specifications set out in Section IV of the sub-subcontracts for the sum of RM5,610,300 and RM1,388,700 respectively ("the sub-subcontracts"). A dispute arose between the plaintiffs and the defendant in respect of the sub-subcontracts and the defendant referred the dispute to arbitration pursuant to the terms of the sub-subcontracts.

Arbitrators were duly appointed. The plaintiffs and TBV entered into a settlement agreement ("the settlement agreement") in respect of the sums due under the sub-contracts between the plaintiffs and TBV. There subsequently arose a dispute in regard to the settlement agreement in respect of which the plaintiffs initiated Civil Suit No. D3-22-66-2005 ("the D3 action") against TBV. The defendant is not a party to the settlement agreement.

[3] The relevant clauses relating to arbitration are contained in cls. 40 and 41 of the sub-subcontract ('cl. 40' and 'cl. 41' respectively). They read as follows:

GC.40-Arbitration

(i) If at any time any question, or difference shall arise between the Sub-contractor and the Sub-Subcontractor, either party shall, as soon as reasonably practicable, give to the other notice in writing of the existence of such question, dispute, or difference, specifying its nature and the point at issue, and the same shall be referred to the arbitration of a person to be agreed upon or failing such agreement within 6 weeks, to some person appointed on the application of either of the parties to the Contract by the President for the time being of the Institution of Engineers (Malaysia). Any such reference shall be deemed to be as submission to Arbitration under the provision of the Arbitration Act, Malaysia 1952 (revised 1972) and/or any statutory modification or re-enactment thereof for the time being in force. The award of the Arbitration shall be final and binding on the parties. Upon every or any such reference the costs of and incidental to the reference and award respectively shall be in the discretion of the Arbitration, who may determine the amount thereof or the basis upon which the same shall be ascertained.

(ii) Performance of the Contract shall continue during arbitration proceedings unless the Subcontractor shall order the suspension thereof or of any part thereof and if any such suspension shall be ordered the reasonable expenses of the Sub-Subcontractor occasioned by such suspension shall be added to the Contract Price.

GC.41-Law Governing Contract

(i) The Contract shall be governed and construed according to Malaysian Law and the Courts of Malaysia shall have exclusive jurisdiction to hear and determine all actions and proceedings arising out of the Contract and the Sub-Subcontractor hereby submits to the jurisdiction of the Courts in Malaysia, for the purpose of all such actions and proceedings.

A (ii) The Sub-Subcontractor binds himself to acknowledge and accepts as final in all respects within the country of domicile of the Sub-Subcontractor or elsewhere any decision or award of an arbitrator or judgment in any court in Malaysia in relation to any dispute between the parties under the Contract whether in respect
B of payments to be made hereunder or in other matters. This undertaking is valid in all respects in case any such decision, award or judgment is to be enforced in the courts of the country of domicile of the Sub-Subcontractor or elsewhere in any manner.

[4] The plaintiffs filed an originating summons dated 16 February
C 2005 in the High Court seeking for a declaration, *inter alia*, that

(i) any dispute between the plaintiffs and the defendant in respect of the sub-subcontracts be dealt with by the Courts of Malaysia;

D (ii) the appointment of the arbitrators by the defendant pursuant to cl. 40 is invalid; and

(iii) the defendant be restrained from proceeding further with the arbitration proceedings pending the hearing and disposal of
E the originating summons and/or pending the hearing and disposal of the plaintiffs' claim against TBV in the D3 action.

The learned High Court Judge took the view that cl. 40 prevailed over cl. 41 and accordingly dismissed the originating summons on
F 16 January 2006. The plaintiffs then appealed to the Court of Appeal. The Court of Appeal found that there are common issues of law involving the plaintiffs, the defendant and TBV and that the plaintiffs ought to bring in the defendant into the D3 action to indemnify themselves. It was also found that unless the plaintiffs
G can bring the defendant as a party to the D3 action, or manage to consolidate their action with the one against TBV, the plaintiffs would be prejudiced. It was further found that the arbitration proceedings would deprive the plaintiffs of their right to institute third party proceedings against TBV to indemnify them in the
H defendant's claim against them under the sub-subcontracts. This would result in duplicity of proceedings. It was also found that the dispute between the plaintiffs and the defendant is whether the plaintiffs owe the defendant any sum of money and if so, the amount. This dispute is in fact an integral part of the dispute
I between the plaintiffs and TBV. Thus the Court of Appeal expressed the view that the plaintiffs are justified in invoking O. 4

r. 1(1) of the Rules of the High Court in aid of its cause. Finally, it was held that as cl. 40 is inconsistent with cl. 41 it should not be given any effect. The Court of Appeal then allowed the appeal with an order in terms of the declaration as prayed for in the plaintiffs' originating summons dated 16 February 2005. No order as to costs was made.

[5] The defendant obtained leave to appeal to this court pursuant to s. 96(a) on the following two questions:

(a) Whether the existence of a valid arbitration clause accepted and agreed to by the appellant and the respondents can be disregarded and/or superseded by a governing law clause?

(b) Whether the Court of Appeal has the power and jurisdiction to injunct an arbitration proceeding between two parties for the purpose of consolidation of the said arbitration with a civil suit involving a third party (not a party to the arbitration proceedings) in the absence of any provisions in the arbitration agreement or the Arbitration Act 1952 to enable such a consolidation?

[6] Before dealing with the two questions, it is perhaps necessary to be reminded of the requirements of s. 96(a) which reads as follows:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court:
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage.

It is perhaps necessary to refer to *Joceline Tan Poh Choo & Ors v. V Muthusamy* [2009] 1 CLJ 650 where this court in reviewing s. 96(a) said at p 657:

> In commenting on the criteria to be satisfied in an application for leave to appeal under section 96 (a) Edgar Joseph Jr FCJ said in *Datuk Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 at p 265:

To sum up, without prejudice to the generality of what we have thus far said, the Federal Court exercises its sensitive power to grant leave to appeal in civil cases sparingly and will not grant such leave unless both of the following criteria are satisfied by an intending appellant:

(1) the judgment of the Court of Appeal has raised a point of general principle **which the Federal Court has not previously decided** or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and

(2) if the point is decided in favour of the intending appellant, there is a *prima facie* case for success in the appeal. (emphasis added)

It must be observed, and with respect, that the use of the words "… which the Federal Court has not previously decided …" in criterion (1) may not be an accurate representation of section 96 (a). An analysis of the section will make this clear. It contains two circumstances in which an appeal may be made to this Court. They are:

Limb (a)

A question of general principle decided for the first time.

It is obvious that this is a reference to a decision of the Court of Appeal for the first time on a question of general principle. As section 96 (a) deals with appeals from the Court of Appeal to the Federal Court the word "… decided …" in section 96 (a) refers to a decision that has already been made. The use of the word in the past tense makes this manifestly patent. A decision that has been made can only be a reference to a decision of the Court of Appeal.

Limb (b)

A question of importance upon which further argument and a decision of the Federal Court would be to public advantage.

This limb is an unambiguous reference to an issue upon which there have been two or more previous decisions of the Court of Appeal. This is made clear by the purpose of limb (a) and the language of this limb itself. A reference to further argument and the fact that a decision of the Federal Court would be to public advantage has in contemplation two or more previous decisions of the Court of Appeal on the same issue which are, for example, in conflict or are wrong or made in ignorance of a binding precedent or made in following a decision of the Federal Court

which is vague or wrong. Such a situation would create confusion to the public in the application of the legal principle involved to their affairs. In that event further argument and a decision of the Federal Court on the issue involved would be to public advantage as the confusion would be resolved.

It is thus clear that both limb (a) and limb (b) are separate and as they cater for two distinct circumstances they are mutually exclusive. It is now appropriate to consider the use of the words "... which the Federal Court has not previously decided ..." referred to earlier in the passage from *Datuk Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 in limb (a). It will be recalled that the reference in that limb to the decision made for the first time is to that of the Court of Appeal. It is true that the fact that the Federal Court has not previously decided on a point may mean that it is also the first time that the Court of Appeal has decided on the point as contemplated by limb (a). But, unfortunately, it can also mean that the Court of Appeal has decided on the point previously and that the Federal Court has not decided on it yet thereby making it a case upon which the Federal Court has not previously decided. It is clear by now that limb (b) becomes relevant only when there are two or more decisions of the Court of Appeal on a certain point. Thus the use of the words "... which the Federal Court has not previously decided ..." in limb (a) in *Datuk Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257 will create confusion in the proper meaning to be accorded to both the limbs. They ought to be replaced with the words "... decided by the Court of Appeal for the first time ..." as contemplated by section 96(a). That will remove any confusion that may arise and, additionally, bring into proper focus the underlying distinction between both the limbs.

In an application for leave to appeal an intending appellant must identify the proper limb under which his case falls and address the arguments accordingly.

The next matter for consideration is whether the point if decided in favour of the intending appellant will show that there is a *prima facie* case for success in the appeal. This would depend on the issue to be raised in the appeal and, thus, on the nature and manner in which the question for appeal is framed. It must be so couched as to incorporate a point of law which has the effect of reversing findings made against the intending appellant without any further evaluation of the evidence. This in turn means that the answer given to the question must be such that it has the

effect of reversing the judgment. It is only then that the question of success in the appeal can arise. It must be remembered that the very object of making appeals to this Court subject to leave is to prevent frivolous and needless appeals (see *Kredin Sdn Bhd v. OCBC Bank (M) Bhd* [1998] 3 MLJ 78). Leave to appeal on a proposed question will therefore not be granted if there is no hope of success (see *Beatrice a/p AT Fernandez v. Sistem Penerbangan Malaysia & Ors* [2005] 3 MLJ 681). This is logical. If the answer to the proposed question is obvious in the sense that it will not be in favour of the intending appellant there will be no basis for a *prima facie* case for success in the appeal. Where a decision depends on the application of a well-established principle to an individual set of facts, a further appeal to the Federal Court will be of no utility if it will do nothing to clarify or refine the principle, so as to make it applicable to other situations in the future (see *Datuk Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors* [1999] 1 MLJ 257). The question posed must relate to a matter in respect of which a determination has been made by the Court of Appeal as otherwise it will be academic (see *The Minister for Human Resources v. Thong Chin Yoong and Another Appeal* [2001] 4 MLJ 225 and *Raphael Pura v. Insas Bhd & Anor* [2003] 1 MLJ 513). It follows that a question cannot be based on an assumption that a finding has been made in respect of it when, as a matter of fact, no such finding has been made. However, a new point of law can be raised if all the facts necessary to support it have been raised in the Court of Appeal (see *Lim Geak Liang v. East West UMI Insurance Bhd* [1997] 3 MLJ 517). Needless to say, the parties may by consent reframe or amend the question at the hearing stage of the appeal with the approval of the Court as demonstrated in *The Board of Trustees of the Sabah Foundation & Ors v. Datuk Syed Kechik bin Syed Mohamed & Anor* [2008] 5 MLJ 469.

The corollary is that if there is no prospect of success in the appeal the position of the appellant will not be affected and it would be pointless hearing the appeal. In *Sun Life Assurance Co of Canada v. Jervis* [1944] 1 All ER 469 Viscount Simon LC said at p 470:

> I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way. If the House undertook to do so, it would not be deciding an existing *lis* between the parties who are before it, but would merely be expressing its view on a legal

> conundrum which the appellant hopes to get decided in its favour without in any way affecting the position between the parties.

In *Loknath Padhan v. Birendra Kumar Sahu* AIR [1974] SC 505 Bhagwati J said at p 508:

> If an issue is purely academic in that its decision one way or the other would have no impact on the position of the parties it would be waste of public time and indeed not proper exercise of authority for the Court to engage itself in deciding it. … It would be clearly futile and meaningless for the Court to decide an academic question, the answer to which would not affect the position of one party or the other. The Court would not engage in a fruitless exercise. It would refuse to decide a question, unless it has a bearing on some right or liability in controversy between the parties. If the decision of a question would be wholly ineffectual so far as the parties are concerned, it would be not only unnecessary and pointless but also inexpedient to decide it and the Court would properly decline to do so.

Thus this Court has the power to decline to answer questions posed in appropriate instances in spite of the fact that leave to appeal had been granted with the result that the appeal must be dismissed without a consideration of its merits. This is demonstrated by cases such as *The Minister for Human Resources v. Thong Chin Yoong and Another Appeal* [2001] 4 MLJ 225, *Raphael Pura v. Insas Bhd & Anor* [2003] 1 MLJ 513, *Sri Kelangkota – Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257, *Perwira Affin Bank Bhd v. Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 and *Tan Heng Chew & Ors v. Tan Kim Hor & Ors* [2006] 5 MLJ 313.

[7] It is now apposite to consider the two questions posed.

Question No. 1.

Whether The Existence Of A Valid Arbitration Clause Accepted And Agreed To By The Appellant And The Respondents Can Be Disregarded And/Or Superseded By A Governing Law Clause?

[8] Quite obviously the object of this question is to determine whether cl. 40 can be superseded by cl. 41. But the manner in which it is couched does not give such an impression. Firstly, it is anchored on the premise that the arbitration clause is valid and

A has been accepted and agreed to by both the parties. If it is valid and accepted and agreed to as such by both parties the question of it being superseded does not and cannot arise as it must prevail. On the contrary the Court of Appeal did not decide that the arbitration clause is valid. It was ruled that it was inconsistent
B with cl. 41 and was thereby ineffective. This is in direct contrast to the manner in which the question has been framed. Secondly, the question seeks a resolution of the prevailing effect of a "governing law clause". Such a clause without any qualification is a reference to a clause that deals exclusively with the applicable
C law. The Court of Appeal did not consider such a position. It dealt with cl. 41 which, apart from dealing with the applicable law, also dealt with the jurisdiction of the courts to hear and determine all actions and proceedings arising out of the contract between the parties. This does not accord with the manner in which the
D question has been framed which is confined to the prevailing effect of a governing law clause *per se*. Be that as it may, the question is very general in nature. It merely seeks a resolution of the prevailing effect of a governing law clause over an arbitration clause. Cases like *EJR Lovelock Ltd. v. Exportles* [1968] 1 Lloyd's
E Rep 163, *Shell International Petroleum Co Ltd v. Coral Oil Co Ltd* [1999] 1 Lloyd's Rep 72 and *Paul Smith Ltd v. H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 make it clear that in such cases it is a matter of the construction of the two conflicting provisions based on the language employed in them
F that determines which one is to prevail. The question posed makes no reference to a consideration of this critical issue. Thus the question as it stands does not deal with the judgment or order made by the Court of Appeal and, in any event, is very general.

G *Question No. 2*

Whether The Court Of Appeal Has The Power And Jurisdiction To Injunct An Arbitration Proceeding Between Two Parties For The Purpose Of Consolidation Of The Said Arbitration With A Civil Suit Involving
H *A Third Party (Not Party To The Arbitration Proceedings) In The Absence Of Any Provision In The Arbitration Agreement Or The Arbitration Act 1952, To Enable Such A Consolidation?*

[9] This question would be justified if the Court of Appeal had in fact injuncted the arbitration proceedings between the two
I parties for the purpose of consolidating it with a civil suit. The relevant part of the judgment of the Court of Appeal which deals with the issue of consolidation reads as follows:

It is our judgment that the Sub-Subcontracts cannot be read in isolation as being between the plaintiffs and the defendant to the exclusion of any other party, in particular, TBV. The Sub-Subcontracts must necessarily be subject to the Sub-Contracts between the plaintiffs and TBV. It is for this reason that we find the plaintiffs are justified in invoking the provision of Order 4 rule 1(1) of the Rules of the High Court 1980, in aid of its cause and which states as follows:

> Where two or more causes or matters are pending, then, if it appears to the Court:
>
> (a) that some common question of law or fact arises in both or all of them; or
>
> (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
>
> (c) that for some other reason it is desirable to make an order under this rule,
>
> the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

There is nothing in this part of the judgment of the Court of Appeal to suggest that it injuncted the arbitration proceedings for the purpose of consolidating it with the civil suit which involves a third party (the D3 action). It merely states that the plaintiffs would be justified in resorting to consolidation in aid of their cause. It must be further observed that the order made by the Court of Appeal was merely in terms of the declarations prayed for in the plaintiffs' originating summons dated 16 February 2005 and the material part of the order made in this regard as reflected in the order of court reads as follows:

> DAN ADALAH SELANJUTNYA DIPERINTAHKAN bahawa Responden adalah dilarang dari meneruskan dengan timbangtara sehingga perintah selanjutnya.

Again there is nothing in this part of the order made by the Court of Appeal to suggest that the arbitration proceeding was injuncted for the purpose of consolidating it with the civil suit. The order was made in the light of the conclusion of the Court of Appeal

that cl. 40 is ineffective. Thus, this question also does not deal with the judgment or order made by the Court of Appeal. On the contrary it is confined to a determination of the power of the Court of Appeal to order consolidation in the circumstances described in the question and is therefore hypothetical.

[10] It follows that as both the questions posed do not relate to matters decided by the Court of Appeal they do not come within the ambit of s. 96(a). It is therefore not necessary to answer them.

[11] My learned brother Nik Hashim bin Nik Ab. Rahman FCJ agrees with this judgment while my learned brother Abdul Aziz bin Mohamad FCJ agrees with the conclusion though for different reasons. In the upshot the appeal is dismissed with costs. Deposit to the respondent on account of taxed costs.

Abdul Aziz Mohamad FCJ:

[12] I have read in draft the judgment of my learned brother Augustine Paul, FCJ. I agree that this appeal should be dismissed, but for somewhat different reasons.

[13] The facts are more or less as set out by my learned brother, although I feel it is necessary to make the following qualifications. The two sub-subcontracts were dated 23 September 1996, the dates in January 1997 being the dates of their issue. The settlement agreement was entered into in May 2003, before the dispute between the defendant and the plaintiffs under the sub-subcontracts arose. The clause relating to arbitration is only cl. 40. The Court of Appeal, I believe through sheer inadvertence, had, in their grounds of judgment, entitled cl. 41 as also one for arbitration. It was the President of the Institution of Engineers (Malaysia) who appointed the arbitrators under cl. 40, not the defendant.

[14] In allowing the appeal of the plaintiffs (the respondents here) the Court of Appeal, according to their grounds of judgment, made two decisions. They first decided that the disputes involving the three parties, namely the dispute between the defendant (the appellant here) and the plaintiffs under the sub-subcontracts, which the defendant had initiated steps to take to arbitration, and the dispute between the plaintiffs and the main contractor TBV under the settlement agreement, which the plaintiffs had taken to

court by the D3 action, ought to be resolved in the D3 action – under one roof, as the plaintiffs' counsel put it before us – one reason being to avoid duplicity of proceedings. Since the D3 action, when instituted, did not involve the defendant, to achieve the resolution of the disputes under the one roof of the D3 action, the Court of Appeal were of the "considered view that the plaintiffs ought to bring in the defendant into the D3 action …". Later on, however, perceiving somehow that the plaintiffs intended to proceed by consolidating the two proceedings, that is, the arbitration and the D3 action, said that the plaintiffs were "justified in invoking" the provisions of O. 4 r. 1(1) of the Rules of the High Court 1980, about consolidation, "in aid of [their] cause".

[15] To give effect to the decision of the Court of Appeal that the disputes ought to be resolved under one roof, it was necessary that the arbitration of the dispute between the defendant and the plaintiffs under the sub-subcontracts be stayed. Therefore in allowing the plaintiffs' appeal the Court of Appeal made an order restraining the defendant from proceeding with the arbitration until further order. The second leave-question for the present appeal relates to this restraining order or injunction.

[16] The Court of Appeal also, later in their grounds of judgment, decided that cl. 40 of the sub-subcontracts was "inconsistent" with cl. 41, "so much so that the court ought not give effect to the same", adding, "Such disputes as exist between the parties should be decided by the court". The first leave-question for the present appeal relates to that decision.

[17] That decision was what the plaintiffs sought in the High Court, where they sought a declaration that cl. 41 prevailed over and overrode cl. 40. In the present appeal, as in the courts below, the defendant's contention is that cl. 41 does not override cl. 40. The plaintiffs' counsel informed us that when the appeal was heard the Court of Appeal had agreed with the defendant. Be that as it may, the plaintiffs now concede that the defendant and the Court of Appeal were right – that cl. 41 does not override cl. 40 – and do not now seek the upholding of the Court of Appeal's subsequent ruling in their grounds of judgment that cl. 41 overrode cl. 40. With that concession, the first leave-question does not require to be given an answer, although I think the plaintiffs are right in so conceding.

[18] The plaintiffs, however, contend that despite the existence of the arbitration cl. 40 in the sub-subcontracts the Court of Appeal had the power to put the arbitration under injunction and had good reasons to exercise the power in the circumstances of this case. The plaintiffs' counsel submits that the second leave-question ought not to have included the second part about consolidation being the purpose of the injunction because the order of the Court of Appeal did not state the purpose of the injunction. He explains that in the Court of Appeal, contrary to what the Court of Appeal said in their grounds of judgment, he did not invoke O. 4 r. 1(1) in aid of the plaintiffs' cause. He admits that he only referred to O. 4 r. 1(1) in order to make the point that if there was no injunction on the arbitration the plaintiffs would not be able to have the entire dispute between the parties resolved under one roof because, without an injunction, the only course open to achieve that would be to consolidate the two disputes but it would not be possible under O. 4 r. 1(1) to consolidate the arbitration with the D3 suit. Therefore the only course open to the plaintiffs would be, as even the Court of Appeal themselves said, to bring the defendant into the D3 action by a joinder procedure. But if that was to be done so that the entire dispute could be resolved in the D3 action, it was necessary that the arbitration proceedings be restrained in order to avoid duplicity of proceedings. The plaintiffs' counsel submits that were the second leave-question to be without its second part, the question which would remain is a question about the power *per se* of the Court of Appeal to restrain arbitration proceedings, which should, in view of various statutory provisions and authorities, be answered in the affirmative.

[19] From the Court of Appeal's saying that the defendant ought to be brought into the D3 action, it would appear that the plaintiffs did not in the Court of Appeal represent that they would resort to consolidation to achieve a resolution of the disputes under one roof. As to O. 4 r. 1(1), the plaintiffs' written outline of submission in the Court of Appeal does include a quotation of that rule, but it is not apparent from the written outline what the plaintiffs' point was in quoting that rule. Whatever the truth may be, of primary importance is that the Court of Appeal merely placed an injunction on the arbitration and did not do so for the purpose of consolidation. They did so to enable the disputes to be resolved in the D3 action. How, in order to achieve that

purpose, the defendant was to be brought into the D3 action is a secondary question and was not ordered by the Court of Appeal.

[20] It is obvious to me, from the manner in which the second leave-question is framed, especially from the contents of the "purpose" part of it, that to the defendant, on whose behalf the question was framed, the answer to it should be in the negative, that is to say, the Court of Appeal did not have the power to injunct the arbitration, not because it was not vested with the power *per se*, but because the purpose of the injunction as stated in the question, that is, the purpose of consolidation, is not capable in law of achievement. If the stand of the defendant was that the Court of Appeal did not have the power to injunct arbitration proceedings in any event, there would have been no necessity to include the second part, the "purpose" part, in the question. The inclusion of that part, which is the really essential part, implies a stand that even though the Court of Appeal has the power to injunct arbitration proceedings, it does not have the power to do so if it is for the purpose of consolidation as stated in the question.

[21] Since the Court of Appeal did not injunct the arbitration in this case for that purpose, the question as it stands has no factual basis and is hypothetical or conjectural. It cannot be answered as it stands. It can only be answered if the second part were removed, and the answer then, as the question impliedly accepts, and as I accept after considering the argument of the plaintiffs' counsel, would be in the affirmative.